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Article 2: Sales

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ARTICLE 2: SALES

SECTION 2-314. Implied Warranty: Merchantability; Usage of Trade

(1) Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the ordinary purposes for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, quality and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (Section 2-316) other implied warranties may arise from courses of dealing or usage of trade.

CASES ANNOTATED UNDER OTHER SECTIONS

‡SCANLON v. FOOD CRAFTS, INC.

2 Conn. Cir. 3, 193 A.2d 610 (1963)

See the Annotation to Section 2-315, infra.

SECTION 2-315. Implied Warranty: Fitness for Particular Purpose

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

ANNOTATION

‡SCANLON v. FOOD CRAFTS, INC.

2 Conn. Cir. 3, 193 A.2d 610 (1963)

Plaintiff purchased a grinder (a type of sandwich) from defendant's cart vendor. Defendant bought all ingredients for the sandwiches including the bread from suppliers, but made the grinders itself. The bread ordinarily used by the defendant was hard outside and soft inside. When the plaintiff

‡ Based on 1962 Code.

took his first bite, he felt a sharp pain and found that a de-sensitized tooth had broken on the bread which was stale and hard throughout. Plaintiff brought an action for damages arising from defendant's alleged breach of implied warranty.

The court held that the seller was liable for damages resulting from the natural consequences of his breaching the implied warranty of fitness for a particular purpose as imposed by Section 2-315. Hence, the defendant's defense that the injury was caused by the plaintiff's weak tooth would not prevail since the injury was a consequence of the breach.

COMMENT

Although the result would not differ, this case should have been decided under Section 2-314 rather than 2-315. The facts clearly point to an implied warranty of merchantability and fitness for the *ordinary purposes* for which the goods are used within the meaning of Section 2-314(2)(c) rather than a *particular purpose*. The buyer intended to use the grinder in the same manner in which every other grinder is used—to eat it. He had no particular purpose as required by Section 2-315.

The court mentioned that no defense was raised to exclude the implied warranty under Section 2-316(3)(b). Under the facts of the instant case, it seems doubtful that the defense, if raised, would have changed the result. A buyer in these circumstances would not reasonably be required to open the sandwich and examine the inside before eating.

Although the court did not cite Section 2-715(2)(b) specifically, the measure of damages used seems properly within it. However, it might be argued that *all* the damages which occurred were not the proximate result of the breach, but that the plaintiff's weak tooth was the cause of at least *part* of the damages for which the defendant would not be liable.

R.B.S.

CASES ANNOTATED UNDER OTHER SECTIONS

*JAKUBOWSKI v. MINNESOTA MINING & MFG.
80 N.J. Super. 184, 193 A.2d 275 (1963)
See the Annotation to Section 2-318, infra.

SECTION 2-316. Exclusion or Modification of Warranties

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this Article on parol or extrinsic evidence (Section 2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be

* Code construed but did not govern the case.

by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is", "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this Article on liquidation or limitation of damages and on contractual modification of remedy (Sections 2-718 and 2-719).

CASES ANNOTATED UNDER OTHER SECTIONS

‡SCANLON v. FOOD CRAFTS, INC.

2 Conn. Cir. 3, 193 A.2d 610 (1963)

See the Annotation to Section 2-315, supra.

SECTION 2-318. Third Party Beneficiaries of Warranties Express or Implied

A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

ANNOTATION

*‡CONNOLLY v. HAGI

24 Conn. Super. 198, 188 A.2d 884 (1963)

Plaintiff, a gasoline station employee, was injured while repairing the back-up lights of an automobile manufactured by Chrysler Corp. The injury occurred when the owner pushed the reverse button of the automatic transmission while the motor was running, causing the automobile to lurch backward and pin plaintiff underneath. The plaintiff brought an action alleging negligence against the owner and Chrysler and breach of express and implied warranty against Chrysler.

The court, in overruling Chrysler's demurrer to the warranty count,

‡ Based on 1962 Code.

* Code construed but did not govern the case.

held that the plaintiff had stated a cause of action in implied warranty even in the absence of contractual privity. Basing its decision on the fact of the manufacturer's massive advertising upon which the plaintiff had relied as well as the trend of decisions in Connecticut and other states extending the coverage of warranty, the court stated as a matter of public policy the broad rule that "the warranty should be extended to all those who could reasonably be anticipated to use, occupy or service the operation of the chattel." In citing *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), to support that proposition, the court approved the discussion of Section 2-318 and the Official Comment, adding that it would be unrealistic to protect the wife of the purchaser of an automobile, as in *Henningsen*, but not the mechanic who services it.

COMMENT

The rule set forth in this case is the broadest and most liberal extension of implied warranty. The court did not draw the line at the family or guests of the purchaser as had previous cases, but rather it extended the coverage to include those who "use, occupy or service" the goods of the manufacturer. This rule, however, is not broad enough to include the person who, for example, standing by the roadside, is struck and injured by a defectively manufactured automobile.

A theory that would include members of the general public has been proposed. However, absolute liability to any person has not been imposed by any court; that the person harmed had some connection with the purchaser or with the goods prior to the injury is required.

Another theory which would have the implied warranty run with the goods similar to warranties which run with the land in real property law would be more restrictive than the rule set out by the court in the instant case, and a mechanic who has no interest in the automobile to which such warranty could attach would not be protected.

Although this case was not decided under the Code, the court mentioned Section 2-318 in reaching its result. The Official Comment to that section points out the Code's neutrality toward case law extensions of warranties to persons in the distributive chain. It seems implicit in the Official Comment that warranty cannot be extended beyond this chain. Thus, the bystander might not recover if the Comment to Section 2-318 were applied strictly. The court's indication at one point that "distributive chain" included the plaintiff who became a "consumer" when the owner requested him to service the automobile is somewhat far-fetched. It may help to justify the holding, but it is clear that the court was intent on finding for the plaintiff as a matter of public policy.

R.B.S.

ANNOTATION

*Jakubowski v. Minnesota Mining & Mfg.
80 N.J. Super. 184, 193 A.2d 275 (1963)

* Code construed but did not govern the case.

Ford Motor Co. purchased abrasive discs from the defendant manufacturer to be used for edge sanding operations. Ford and its employees relied on statements in the defendant's price list and catalogue which described the discs as "stronger, sharper, and longer lived," and as being the "best all-purpose disc—for edge sanding" and listed them as "3M Discs Type 'C'—Green Back." Ford also conducted random tests on the discs to determine their applicability to the particular intended operation and the quality of each lot of discs purchased. They found that one disc would last for five operations.

The plaintiff, an employee of Ford, was injured when a disc which he was using in grinding broke apart and hit him in the abdomen. He brought an action against the manufacturer based on negligence and breach of express and implied warranty. The manufacturer raised, inter alia, the defenses of absence of express warranty, lack of contractual privity and exclusion of warranty by reasonable inspection. The lower court entered an involuntary dismissal against the plaintiff on both counts.

On appeal, although the court affirmed the lower court's ruling on the negligence count, it reversed the dismissal of the finding on the alleged breach of warranty, holding that the question should have been presented to the jury. Even though the court applied the New Jersey Uniform Sales Act, it cited the sections of the Code which would have applied had it been in effect, indicating that the new law would not change the result. While rejecting the claimed breach of express warranty because the information in the defendant's catalogue was only an expression of opinion, the court, however, did find ample evidence to support an implied warranty. In resolving the lack of privity issue, the court cited *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), for the proposition that members of the purchaser's family could recover on an implied warranty against the seller. It then found the plaintiff to be a part of the Ford "family" because of his employment. It then stated the broad rule set forth in *Henningsen* to the effect that warranties should be extended to all users of the goods who could reasonably be anticipated. The plaintiff was also found to be in this class. Thus, plaintiff was not barred by privity from stating a cause of action.

The court rejected the defendant's claim of an exclusion of implied warranty by reason of an inspection which reasonably should have revealed the defects because the tests necessary to discover such defects would have destroyed the usefulness of the discs. The defense that the discs were sold under a trade name which, under the Uniform Sales Act, would exclude any implied warranty of fitness for a particular purpose was not accepted since the court determined the catalogue designation to be for the convenience of the defendant and not a trade name.

COMMENT

It is not clear what the precise basis for the decision was in this case. The court first states the policy rule of the *Henningsen* case, but then, probably to give the decision stronger support as precedent, distorts the

meaning of "family" so as to include this plaintiff employee. It would have been more proper to decide the case on the basis of the broad rule alone, as a matter of public policy and thereby define the limits of Section 2-318.

The instant case is contrary to the recent Pennsylvania Supreme Court case of *Hochgertel v. Canada Dry Corp.*, 409 Pa. 610, 187 A.2d 575 (1963), annotated in 4 B.C. Ind. & Com. L. Rev. 612 (1963). In *Hochgertel,* the court refused to allow an employee of the purchaser to recover on an implied warranty, despite developing case law in the lower state and federal courts of Pennsylvania which would support allowing recovery. There is no logical distinction between the facts of the instant case and those of *Hochgertel.*

The defense available under the Sales Act that the discs were sold under a trade name which eliminated an implied warranty of fitness for a particular purpose has been eliminated from the provisions of the Code as a defense per se. Section 2-315. Cf. Official Comment 11.

R.B.S.

CASES ANNOTATED UNDER OTHER SECTIONS

‡WILSON v. AMERICAN CHAIN & CABLE, INC.
216 F. Supp. 32 (E.D. Pa. 1963)

For a complete discussion and analysis of this case, see note infra p.—. Also see Annotation, supra p. 155.

SECTION 2-609. Right to Adequate Assurance of Performance

(1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.

(2) Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.

(3) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.

(4) After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

ANNOTATION

*REPUBLIC-ODIN APPLIANCE CORP. v. CONSUMERS PLUMBING & HEATING SUPPLY, INC.
192 N.E.2d 132 (Ohio Ct. C.P. 1963)

‡ Based on 1962 Code.
* Code construed but did not govern the case.

In November 1958, the defendant-buyer had several orders pending with the plaintiff-seller to be delivered in installments. A dispute arose as to the validity of the buyer's arbitrarily withholding a portion of the payment for the first shipment as insurance for future deliveries. The seller had informed the buyer that its action was unwarranted and it, therefore, refused to ship future orders; the buyer responded that it was going to purchase the goods elsewhere unless certain unprecedented demands were met. In an action by the seller for the amount withheld to which the buyer had counterclaimed for the difference in price it had paid for the goods, the court entered judgment for the seller. It held that the holding back of a portion of the shipment price constituted a material breach which, under the Uniform Sales Act, permitted the seller to repudiate the future orders. The court noted the right of a party to an installment contract to receive assurance that future performance will be forthcoming as provided by the not then effective UCC. It cites Section 2-609, as providing a manner of obtaining adequate assurance.

COMMENT

Had the Code governed this case, it is doubtful whether it would have been decided under Section 2-609. While it does appear from the facts that the seller might have had reasonable grounds for insecurity, it is not clear as to whether the seller, effectively in writing, demanded adequate assurances from the buyer that performance would be forthcoming when due. The seller's letter was an affirmative notification of discontinuance of performance by the seller with respect to all future orders and not a demand for assurance of future performance of the buyer. Since such a demand was not made, Section 2-609 would not justify the seller's treating the buyer's failure to make the complete payment as a repudiation.

The seller's course of action might have been justifiable under Section 2-610 or 2-612. Under Section 2-612, if the breach of the first order was one which substantially impaired the value of the *whole contract*, rather than the first installment, all future installments under the contract were breached. Upon such a breach the seller could treat the future installments as being anticipatorily repudiated, as provided by Section 2-610.

C.K.B. JR.

SECTION 2-610. Anticipatory Repudiation

When either party repudiates the contract with respect to a performance not yet due the loss of which will substantially impair the value of the contract to the other, the aggrieved party may

(a) for a commercially reasonable time await performance by the repudiating party; or

(b) resort to any remedy for breach (Section 2-703 or Section 2-711), even though he has notified the repudiating party that he would await the latter's performance and has urged retraction; and

(c) in either case suspend his own performance or proceed in ac-

cordance with the provisions of this Article on the seller's right to identify goods to the contract notwithstanding breach or to salvage unfinished goods (Section 2-704).

CASES ANNOTATED UNDER OTHER SECTIONS

*REPUBLIC-ODIN APPLIANCE CORP. v. CONSUMERS PLUMBING & HEATING SUPPLY, INC.
192 N.E.2d 132 (Ohio Ct. C.P. 1963)
See the Annotation to Section 2-609, supra.

SECTION 2-612. "Installment Contract"; Breach

(1) An "installment contract" is one which requires or authorizes the delivery of goods in separate lots to be separately accepted, even though the contract contains a clause "each delivery is a separate contract" or its equivalent.

(2) The buyer may reject any installment which is non-conforming if the non-conformity substantially impairs the value of that installment and cannot be cured or if the non-conformity is a defect in the required documents; but if the non-conformity does not fall within subsection (3) and the seller gives adequate assurance of its cure the buyer must accept that installment.

(3) Whenever non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole. But the aggrieved party reinstates the contract if he accepts a non-conforming installment without seasonably notifying of cancellation or if he brings an action with respect only to past installments or demands performance as to future installments.

CASES ANNOTATED UNDER OTHER SECTIONS

*REPUBLIC-ODIN APPLIANCE CORP. v. CONSUMERS PLUMBING & HEATING SUPPLY, INC.
192 N.E.2d 132 (Ohio Ct. C.P. 1963)
See the Annotation to Section 2-609, supra.

SECTION 2-715. Buyer's Incidental and Consequential Damages

(2) Consequential damages resulting from the seller's breach include
(a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise;

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‡ Based on 1962 Code.